again held that an attorney may not recover fees even for successful issues unless the specific items are first submitted at an Informal Conference and the employer is given a chance to comply with the request and recommendation.[1]

Accordingly, the Fourth Circuit's decision in *Edwards* is completely consistent with the decisions of the Fifth Circuit on this issue.

Nevertheless, Claimant argues that the Fourth Circuit's decision directly conflicts with a decision of the Ninth Circuit, citing *National Steel & Shipbuilding Co. v. U.S. Dept. of Labor*, 606 F.2d 875 (9th Cir. 1979). This contention is inaccurate, for several reasons. First, the Ninth Circuit's Decision in *National Steel* is factually distinguishable from the Fourth Circuit's decision in this case, thus there is no valid circuit split as to the rule of law. Furthermore, the Ninth Circuit has again addressed this issue since its decision in *National Steel* and based on a different set of circumstances, came to a contrary conclusion, which is in fact consistent with the Fourth and Fifth Circuits.

First, *National Steel* is sufficiently factually divergent from *Edwards* so as to render the holdings mutually exclusive. An Informal Conference was, in

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[1] The claimant sought a rehearing of this Order. On rehearing, the court reversed and awarded attorney's fees based on a re-examination of the facts under which it concluded that the disputed issue had in fact been addressed at an Informal Conference therefore entitling the claimant's attorney's to his fee. The court did not reverse its position on the law, only on the facts as applied to the law. Staftex, 237 F.3d 409.

fact, held in that case and a recommendation issued. The only issue was whether the recommendation was sufficient to warrant fee shifting under § 928(b). Not only was it found to be sufficient, the panel held that the employer had procedurally waived the objection. *National Steel*, 606 F.2d at 882. This is, then, vastly different from the facts in *Edwards*, where there was no Informal Conference or recommendation and, thus, no attempt by the claimant to resolve the claim prior to resort to formal adjudication. The two cases are therefore readily distinguishable on their facts and cannot support the contention that there is a valid circuit split on this issue worthy of this Court's review.[2]

Next, Claimant contends that *National Steel* is the "seminal" decision on the issue of attorney's fees pursuant to § 928(b) of the Act, and the Fourth Circuit's failure to address it renders its decision in error. However, over a decade later, the Ninth Circuit addressed the issue directly in *Todd Shipyards Corp v. Director, OWCP*, 950 F.2d 607 (9th Cir. 1991), a Ninth Circuit case to which the Fourth Circuit did indeed cite in support of its conclusion.

The *Todd Shipyards* panel thoroughly reviewed the congressional history of § 928(b) and reached the conclusion that "Section 928(b) authorizes a payment of attorney's fees only if the employer refuses to pay the amount of compensation recommended by the Claims Examiner following an informal conference."

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[2] Contrary to the Petitioner's assertion on brief, the panel in *National Steel* did not either cite or discuss the legislative history of the statute. *Pet. Brief at 12.*

Id. at 610. The Ninth Circuit explained: "[w]hile we believe that the intent of Congress is clear from a plain reading of the words used in Section 928(b), the legislative history explains unequivocally the very limited scope of attorney's fees awards under the statute." *Id.* In so doing, it quoted the history specific to § 928(b), which is conspicuously absent from Petitioner's Brief:

> A new provision is added dealing with cases where payment of compensation is tendered and an unresolved controversy develops about the amount of additional compensation, *despite the written recommendation of the deputy commissioner.* The provision directs an award of attorney's fee... *where the employer or carrier has refused to accept the recommendation....*
>
> *In all cases other than those specified above,* attorneys' fees may not be assessed against the employer.

Id. (quoting from H.R. Rep. No. 92-1441, 92nd Cong., 2nd Sess. 3, reprinted in 1972 US Code Cong. & Admin News 4698, 4717)(emphasis added by the Ninth Circuit).[3]

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[3] In support of its conclusion, the Ninth Circuit relied on a case out of the Fourth Circuit Court of Appeals, *Kemp v. Newport News Shipbuilding*, 805 F.2d 1152, 1153, n. 3 (4th Cir. 1986), wherein the Fourth Circuit stated that Congress intended that disputes first be resolved without the parties having to rely on assistance other than that provided by the Department of Labor.

Thus, contrary to the present assertion by the Claimant, *Todd Shipyards*, which was decided after *National Steel*, must be considered the "seminal decision" on this issue. As the Fourth Circuit's decision in *Edwards* is consistent with *Todd Shipyards*, there is no circuit split at all, much less one sufficient to render this case worthy of this Court's consideration.

Claimant also contends that the Fourth Circuit's *Edwards* decision is in conflict with another decision by the Fourth Circuit, *Newport News Shipbuilding and Dry Dock Co. v. Firth*, 134 F.3d 363, 1998 WL 29255 (4th Cir. 1998) (unpublished). As noted, this is an unpublished decision and has little, if any, precedential value, even within the Fourth Circuit, much less outside the circuit. *See* FRAP 4th Cir. Local Rule 36(c) (court will not cite an unpublished disposition absent unusual circumstances, and citation by parties is disfavored).

Additionally, the *Firth* panel did not even decide the issue, but simply alluded to it in a footnote. *Firth*, 134 F.3d at fn. 5. The reference obviously had little impact on the *Edwards* panel as it was ignored completely, despite having been briefed. It is, then of no moment.

There being no valid circuit split, either internally to the Fourth Circuit or externally in the nation, Respondent respectfully suggests that Claimant's petition for writ of certiorari be denied.

II. THIS CASE FAILS TO ADDRESS AN IMPORTANT ISSUE OF GENERAL IMPORTANCE SUFFICIENT TO WARRANT REVIEW BY THIS COURT.

In the alternative, even if this Court determines that there is a valid circuit split as a result of this decision, such subtle distinctions in application of the statute are tolerable and fail to render the issue worthy of this Court's review.

This case simply does not present an issue with ramifications beyond its effect on a small percentage of parties adjudicating claims under the LHWCA. As the Claimant so readily points out in his petition, "some directors . . . rarely hold informal conferences . . . other . . . always hold them." The differences in the informal processing of Longshore claims are not a matter of national importance to a wide range of litigants; rather it is a regional concern. Thus, variations among different parts of the country for implementing the plain language of the statute are acceptable.

For example, the District Director within the region relevant to these parties has historically not held Informal Conferences in certain cases. However, as noted by the Claimant, such is not true for every District Director. There are some regions in which informal processing of longshore claims is mandatory. Further, as noted by the Fourth Circuit, the power of the District Director to forgo the informal procedures proscribed in the regulations cannot "nullify those mandatory statutory conditions" expressly stated in the statute. *Edwards*, 328 F.3d at 320 (citations omitted).

Thus, because District Directors in different areas deal with the informal procedures of adjudicating a claim differently, the relevance of this particular case does not extend beyond this district. It can therefore not be found to involve principles, the settlement of which is of general interest or importance to the public at large.

To the contrary, Claimant misstates the "importance" of this decision. It is not the "arbitrary customs of the local directors" that impacts the litigants and their respective counsel; rather it is the importance given to the informal proceedings of Longshore claims that has collective relevance. In furthering the intent of the Act, the plain language of § 928(b) will not result in "injustice to claimants seeking benefits under the LHWCA" as Claimant contends. Claimants will still continue to receive the benefits to which they are entitled under this Act; they are unaffected by this line of decisions concerning attorneys fees.

Of "national importance" is not the effect on "competent counsel" that the plain language of the Act will have; rather it is the increase in the informal processing of, and more expeditious resolution of disputed claims that will result. The Act was not intended to line the pockets of "competent counsel;" rather it is to ensure that legitimately injured longshoremen and harbor workers are adequately compensated for their injuries in a timely manner. The *Edwards* decision will do nothing to impede that lofty goal, and will in fact further the intent of the legislation. Therefore, whether attorneys are awarded a fee at the expense of employers where there is no

Informal Conference or a written recommendation by the District Director is not a matter of national importance worthy of this Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 05-61

In the Supreme Court of the United States

BENNY R. EDWARDS, PETITIONER

v.

VIRGINIA INTERNATIONAL TERMINALS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals was correct to hold that petitioner's counsel was not entitled to an attorney's fee under Section 28(b) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 928(b), because the district director did not hold an informal conference or issue a written recommendation on the supplemental claim.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3-16) is reported at 398 F.3d 313. The Benefits Review Board's order on motion for reconsideration (Pet. App. 17-21) and initial decision (Pet. App. 22-30), as well as the initial decision of the administrative law judge (Pet. App. 31-34), are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 2005. A petition for rehearing was denied on April 14, 2005 (Pet. App. 1-2). The petition for a writ of certiorari was filed on July 5, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (LHWCA or Act), 33 U.S.C. 901 *et seq.*, provides for two situations in which a claimant may recover from the employer "a reasonable attorney's fee" following successful prosecution of his or her claim. 33 U.S.C. 928. First, a fee award is authorized when the employer declines to pay any compensation within 30 days of receiving written notice of the filing of a claim for compensation and the claimant successfully prosecutes the claim with the help of an attorney. 33 U.S.C. 928(a). Second, a fee award may be authorized in certain circumstances when the employer pays compensation without an award and a controversy develops over the amount, if any, of additional compensation due. 33 U.S.C. 928(b). In that situation, the LHWCA instructs the deputy commissioner to set the matter for an informal conference and to recommend in writing a disposition of the controversy.[1] If the employer refuses to accept the written recommendation, it must pay within 14 days any additional compensation to which it believes the claimant is entitled. If the claimant refuses to accept the payment and, with the help of an attorney, is awarded compensation in excess of the amount offered by the employer, the claimant is entitled to a reasonable attorney's fee based on the difference between the amount awarded and the amount tendered. 33 U.S.C. 928(b).

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[1] Regulations promulgated by the Department of Labor use the term "[d]istrict [d]irector" in lieu of the statutory term "[d]eputy [c]ommissioner." See 20 C.F.R. 701.301(a)(7); 70 Fed. Reg. 43,233 (2005).

2. On February 22, 2002, petitioner Benny R. Edwards was injured while working as an employee of respondent Virginia International Terminals, Inc. (VIT). Pet. App. 4. On February 28, 2002, he filed a claim for benefits under the LHWCA. *Ibid.* VIT filed a "Payment of Compensation Without Award" form with the Office of Workers' Compensation Programs (OWCP) on March 18, 2002, and voluntarily paid temporary disability benefits to petitioner for the period from February 26, 2002, until March 31, 2002, when it terminated payments because petitioner had been cleared to work. *Id.* at 5.

On July 23, 2002, petitioner requested additional benefits for the period from February 23 through 25, 2002, and asked for an informal conference to resolve the request. Pet. App. 5, 24.[2] By letter dated August 1, 2002, the district director requested supporting medical evidence from petitioner. *Ibid.* Petitioner refused and asked for a formal adjudication. On August 22, 2002, the district director forwarded the case to the administrative law judge (ALJ) without a written recommendation. *Id.* at 6, 24-25. On August 27, 2002, however, VIT paid the claimant benefits for the three contested days. *Id.* at 6, 25. The ALJ subsequently terminated the proceeding because the dispute had been resolved. *Id.* at 25, 32.

3. Petitioner's counsel requested an attorney's fee in the amount of $117 for work performed between August 26, 2002, and September 23, 2002, before the ALJ. Pet. App. 6, 25, 32. VIT objected on the ground that the district director had not held an informal conference as required by 33 U.S.C. 928(b). Pet. App. 6, 25, 32. The

[2] Petitioner also requested reimbursement for some medical expenses, which VIT agreed to pay. Pet. App. 24.

ALJ agreed, finding that VIT was not liable for petitioner's attorney's fees under Section 28(b) of the Act, 33 U.S.C. 928(b), because no informal conference had been held and the district director had never made a written recommendation. Pet. App. 31-34.

4. The Benefits Review Board (BRB) reversed, finding VIT liable for attorney's fees under Section 28(a) without reaching the issue of Section 28(b) liability.[3] It based its decision on a Fifth Circuit decision holding that an employer's prior voluntary payment should not preclude liability for attorney's fees under Section 28(a). Pet. App. 27-29 (discussing *Pool Co.* v. *Cooper*, 274 F.3d 173 (5th Cir. 2001)).[4] Reciting the facts of this case, the BRB reasoned that "claimant successfully prosecuted his claim before the administrative law judge" and therefore was entitled to attorney's fees under Section 28(a). *Id.* at 29. The BRB remanded the case to the ALJ to determine the fees due. *Ibid.*

On VIT's request for reconsideration, the BRB vacated the portion of its decision remanding the case to the ALJ and awarded petitioner $117 in fees under Section 28(a) for counsel's work before the ALJ and, additionally, $1581 for counsel's work on the appeal. Pet. App. 17-21.

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[3] The BRB consists of five members appointed by the Secretary who are "authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under [the LHWCA]." 33 U.S.C. 921(b)(3).

[4] In *Pool*, the employer voluntarily paid benefits before any claim was filed, but controverted a claim for additional benefits that was filed after the voluntary payments terminated. The case went before an ALJ who awarded the additional benefits. Pet. App. 28.

5. On February 16, 2005, the court of appeals reversed the BRB's decision on the ground that neither of the Act's fee-shifting provisions authorized an award of attorney's fees under the specific facts of this case. Pet. App. 3-16.

The court reasoned that Section 28(a) by its terms applies only when the employer has refused to pay "*any* compensation." Pet. App. 9 (quoting 33 U.S.C. 928(a)). According to the court, the phrase "filing a claim" in Section 28(a) "refers to a formal action that initiates a legal proceeding, rather than an informal action that seeks to alter or amend a pre-existing settlement on a prior claim," so that, here, the informal request for "modification of the benefits received for the same injury" did not meet the formal filing requirement of Section 28(a). *Id.* at 10-11. Further, the court explained, adjacent statutory subsections that refer to the same subject matter must be read *in pari materia*, but construing Section 28(a) as applicable to supplemental claims would render Section 28(b) superfluous. *Id.* at 11-12. Finally, the court distinguished the Fifth Circuit's decision in *Pool* on the ground that, although the employer in that case had voluntarily paid benefits, the employee had then filed a formal claim for benefits, after which the employer refused to pay any further compensation. This, the court said, "unambiguously fulfilled" Section 28(a)'s conditions for a formal claim followed by a refusal to pay within 30 days of the claim. In contrast, the court reasoned, in this case "VIT voluntarily paid benefits within 30 days *after* [petitioner's] formal claim, thereby rendering [Section 28(a)] inapplicable." *Id.* at 12-13.

Turning to the second fee-shifting provision, the court noted that under the plain language of Section

28(b), attorney's fees may be awarded only when there has been an informal conference followed by a written recommendation that is rejected by the employer, and the employee thereafter achieves a greater award with the help of an attorney. Pet. App. 13-14. The failure to hold an informal conference or to issue a written recommendation was therefore fatal to petitioner's claim for attorney's fees under Section 28(b). *Id.* at 14-16.

ARGUMENT

The court of appeals' decision regarding Section 28(b) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 928(b), is correct and does not conflict with any decision of this Court or any other court of appeals. Further review of petitioner's fact-bound claim is not warranted.[5]

1. At issue in this case is petitioner's entitlement to $117 in attorney's fees. Pet. 7; Pet. App. 32. The court of appeals correctly decided, however, that petitioner was not eligible for this fee award under Section 28(b).

Applying plain language analysis, the court of appeals correctly concluded that the four conditions set forth in Section 28(b)—including holding an informal conference and issuing a written recommendation—must be fulfilled before an attorney's fee may be awarded. Pet. App. 13-15. On the facts of this case, moreover, the court reasonably concluded that those conditions were not satisfied in full. *Id.* at 14-16. Accordingly, the court properly concluded that petitioner

[5] The petition does not challenge the court of appeals' decision denying attorney's fees under 33 U.S.C. 928(a). Accordingly, the Director expresses no view on whether the court correctly decided to reverse the BRB's holding that petitioner was entitled to attorney's fees under that provision.

was not eligible for an award of attorney's fees under Section 28(b).

2. Contrary to petitioner's principal contention (Pet. 10-15), the decision below does not clearly conflict with the decisions of the Ninth Circuit with respect to the question whether an informal conference and written recommendations are mandatory prerequisites to the award of attorney's fees under Section 28(b).[6] In *National Steel & Shipbuilding Co.* v. *United States Dep't of Labor*, 606 F.2d 875 (9th Cir. 1979), which is the primary basis for the claimed circuit conflict, the court affirmed an attorney's fee award when the district director held an informal conference but did not issue a written recommendation following the conference. Noting the congressional intent to limit attorney's fee awards to cases in which parties dispute the existence or extent of liability, the court stated, "[w]e do not believe that the statute contemplates the making of a written recommendation by the deputy commissioner as a precondition to the imposition of liability for attorney's fees." *Id.* at 882 (discussing H.R. Rep. No. 1441, 92d Cong., 2d Sess. 3 (1972)). Further, the court reasoned that even if the "written recommendation" prerequisite was necessary, it was met, in that it was "evident" that the parties would have rejected any explicit recommendation because they had failed to reach an agreement at the informal conference, so that instead "[t]he recommendation following the informal conference * * * was for the

[6] In the question presented (Pet. i) and at various other points in the petition (at 8-9, 11, 18-20), petitioner frames the issue solely in terms of whether an informal conference is a prerequisite, but elsewhere (Pet. 10, 12, 14-17) he appears to give equal consideration to the decisions' treatment of whether a written recommendation is also a prerequisite.